



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 25, 1991

Mr. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR91-592

Dear Mr. Giddings:

By letter of September 26, 1991, you ask us to reconsider our ruling in Open Records Letter OR91-433 (1991). Your letter requesting reconsideration was assigned ID# 13734.

Open Records Letter OR91-433 concerned two requests, one for a copy of an internal investigation report filed against a university police officer and the other for copies of files relating to police training and complaints filed against university police officers. You submitted this matter to us by letter of August 1, 1991, in which you claimed that sections 3(a)(2) and 3(a)(11) excepted the information from required public disclosure under the Open Records Act. We determined that some of the requested information could be withheld pursuant to the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (a)(4)(A), but that none of the information could be withheld pursuant to section 3(a)(2) or section 3(a)(11) of the Open Records Act.

You now ask us to reconsider our decision that nothing in a memo dated July 2, 1991, is excepted from disclosure by section 3(a)(11). You also point out that your original letter cited a number of Open Records Decisions for the proposition that sections 3(a)(2) and 3(a)(11) permit internal investigation reports of peace officers based upon citizen complaints to be withheld in substantial part. Under the rulings you cited, only the name of the complainant, the name of the officer charged, and the final disposition of the matter must be disclosed. We concluded in OR91-433 that none of the information could be withheld under section 3(a)(2), but did not explain why we did not follow the decisions you cited.

We are reconsidering OR91-433 because we have found that some of the material in the memo of July 2, 1991, may be withheld pursuant to section 3(a)(11). In addition, we will explain why section 3(a)(2) does not make the internal investigation report confidential. Your request for reconsideration also raises section 3(a)(8), which you did not raise in your original letter. Since you did not raise section 3(a)(8) in a timely manner, you are deemed to have waived it. Attorney General Opinion JM-672 (1987). Accordingly, we will not consider section 3(a)(8).

Section 3(a)(11) excepts memoranda only to the extent that they contain opinion, advice, or recommendation. Open Records Decision Nos. 559, 538 (1990). Factual material, if it can be separated from the opinion, advice, or recommendation, is not excepted by section 3(a)(11). Open Records Decisions Nos. 559; 308 (1982).

The memo of July 2, 1991, reports the results of an investigation of a complaint against a university peace officer. It sets out the allegations against the peace officer summarizes the information collected about the allegations, and states a decision about the validity of each allegation. The memo consists primarily of factual information. It expressly states that the investigation of each allegation "revealed the following facts." You have highlighted the memo to show which portions you believe may be withheld pursuant to section 3(a)(11) of the Open Records Act. Some of the highlighted material is fact and must be disclosed, while other portions constitute the opinion of the writer. We have marked the portions of the highlighted material that you may withhold pursuant to section 3(a)(11).

Section 3(a)(2) of the Open Records Act excepts

(2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

This office initially construed this provision to accord a broad privacy right to government employees, rendering confidential a large body of information about their employment relationship with the governmental body. *See* Open Records Decision Nos. 278 (1981); 68 (1975). By the time Open Records Decision No. 278


was issued, this office recognized that the decision of the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) cast substantial doubt on the expansive construction of the employee's right of privacy under section 3(a)(2). Open Records Decision No. 106 (1975), which you cite, relied on the expansive reading of section 3(a)(2) that has since been rejected. That decision held that the report of an investigation of alleged misconduct by Department of Public Safety officers was in large part excepted from disclosure by section 3(a)(2) and 3(a)(11). Section 3(a)(2), according to Open Records Decision No. 106, excepted

information concerning evaluation or investigation of the employee's qualifications and performance and the circumstances of termination of his employment.

Section 3(a)(2) is no longer construed to except all material of this kind. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) established that the common-law privacy test articulated in *Industrial Foundation of the South* applies to section 3(a)(2) as well as to section 3(a)(1). Open Records Decision No. 405 (1983). Open Records Letter OR91-443 applied the *Industrial Foundation* test for privacy to the information you claimed was excepted from disclosure by section 3(a)(2) of the Open Records Act.

Since prior judicial decisions and published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-592.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/mc

Ref.: ID# 13734

Enclosures: Attorney General Opinion JM-672; Open Records Decision Nos. 559, 405, 308, 278, 106, 68; marked document

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